

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

TERRY KUEHNER,
Petitioner

v.

COMMONWEALTH OF
PENNSYLVANIA AND BOARD OF
PROBATION AND PAROLE,
Respondents

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CIVIL NO. 1:11-CV-1164

O R D E R

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

We are considering petitioner's objections to the Report and Recommendation ("R&R") of Magistrate Judge Smyser, which recommends that we deny his petition for habeas relief.

Most of petitioner's objections consist of the same claims that were presented in his petition. He argues that trial counsel was ineffective and he has exhausted all of his state remedies or has cause for the ones not exhausted.

Magistrate Judge Smyser found that Kuehner procedurally defaulted all claims that he did not raise in his single PCRA petition, leaving only three ineffective assistance of counsel claims for counsel's failure to present a material witness at trial, call petitioner to testify, and seek to have a biased juror stricken. The Magistrate Judge also found that petitioner did not show cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default of the other claims.

Pursuant to 28 U.S.C. § 2254(b) and (c), a state prisoner must exhaust state remedies prior to filing a petition for habeas corpus or, in the alternative, must show cause why the claims were not exhausted. In order to show cause in an ineffective assistance of counsel claim, petitioner must demonstrate that “there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.” *Werts v. Vaughn*, 228 F.3d 178, 193 (3d Cir. 2000). Petitioner may, in the alternative, show that there was a miscarriage of justice to excuse the procedural default, which requires petitioner to “prove that it is more likely than not that no reasonable juror would have convicted him.” *Id.* After careful review of the record, we agree with the Magistrate Judge’s determination that petitioner procedurally defaulted on all but the three ineffective assistance of counsel claims and petitioner has not shown cause and prejudice or a fundamental miscarriage of justice to excuse the default.

Magistrate Judge Smyser’s opinion thoroughly analyzes the merits of the three remaining claims, finding the PCRA court’s decisions to be reasonable. We agree with this conclusion and adopt the Magistrate Judge’s Report and Recommendation.

ACCORDINGLY, this 19th day of December, 2011, upon consideration of the report and recommendation of the magistrate judge (Doc. 18), filed October 25, 2011, to which objections were filed, and upon independent review of the record, it is ordered that:

1. The magistrate judge’s report is adopted (Doc. 18).
2. Petitioner’s objection (Doc. 19) is overruled.

3. Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

4. The Clerk of Court shall close this file.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge